by statute, and it is high time that the preventive jurisdiction of equity be extended in this country.

If the jurisdictional difficulty be surmounted in the principal case, an injunction was clearly warranted. In the first place, the legal remedy was substantially inadequate. However reasonable the amount of the penalty might be in general as compensation, in the plaintiff's particular case, his business being impaired, no amount of money save an income approximating his loss in earning power would do practical justice. It is conceivable that a hostile theatrical corporation might, by a course of systematic exclusion, entirely ruin him professionally; and certainly the recovery of the statutory penalty would be a trifling recompense. Furthermore, a most important circumstance to be considered by a court in determining its discretion in such a case is the manner in which the public interest in free criticism is involved. That the public concern is always a strong element to be weighed by equity in coming to a decision [7] is demonstrated by the positive manner in which decrees have been given [8] and refused [9] largely upon that ground. And surely there is scarcely a more pointed application of the principle than that here presented. For the wrongful coercion of free speech and opinion, even in such a relatively unimportant matter as theatrical reviews, strikes directly at the public's legitimate interest in unobstructed and unbiased dissemination of information.

If on the other hand the plaintiff was in fact wrongfully using his position to make malicious and unfair comment on the defendant, to the detriment of the latter's business, though he might not be liable for defamation at law, nevertheless his position might be so far from equitable that the court would be justified in washing its hands of the affair and remitting him to his remedy at law.

IS THE INCIDENCE OF THE BURDEN OF PROOF A MATTER OF SUBSTANTIVE OR PROCEDURAL LAW? — The Supreme Court of the United States has recently decided that the federal rule establishing contributory negligence as an affirmative defence must apply in suits arising under the Federal Employers' Liability Act, even though the *lex fori* requires the plaintiff to show his own freedom from fault. By virtue of the Conformity Act, federal courts would follow the local practice in matters of procedure,[1] though the action is brought under a federal statute. "But it is a misnomer," maintains the court, "to say that the question as to the burden of proof is a mere matter of state procedure. For, in Vermont, and in a few other states, proof of plaintiff's freedom from fault is a part of the very substance of his case." *Central Vermont Ry. Co.* v. *White*, 238 U. S. 507. The same question has arisen in another

Curtis, 147 N. Y. 434, 42 N. E. 22, 24; *Ex parte* Warfield, 40 Tex. Crim. R. 413, 421. 50 S. W. 933, 935; Norwood *v.* Dickey, 18 Ga. 528.

[7] See Union Pac. Ry. Co. *v.* Chicago, etc. Ry. Co., 163 U. S. 564, 603. "Considerations of the interest of the public must be given due weight by a court of equity."

[8] Parrott *v.* Atlantic & N. C. R. Co., 165 N. C. 295, 53 S. E. 432.

[9] Conger *v.* New York, W. S. & B. R. Co., 120 N. Y. 29, 23 N. E. 983.

[1] 1 U. S. COMP. STAT. 1913, § 1537, p. 657.

connection in New York, where it was decided that since the incidence of the burden of proof [2] is only a matter of procedure and statutes changing remedial law may act retrospectively,[3] a legislative enactment shifting it shall apply in the trial of a cause of action that arose before the statute was passed. *Sackheim* v. *Piqueron*, 109 N. E. 109.[4] Though the latter decision seems to represent the weight of authority,[5] the important conflict of opinion illustrates the obscurity of the line between substantive and adjective law.

To define substantive rights in terms of all their component elements is impracticable, for such rights are acquired only when a number of conditions are satisfied. In an action for negligent injury, for example, the plaintiff ordinarily has a *primâ facie* right to recover when he has pleaded and proved that the defendant acted carelessly toward him, thereby causing injury, but the defendant may show that despite these circumstances the alleged right never accrued, because of the presence of other conditions, such as the plaintiff's assumption of risk, or his own contributory negligence.[6] Likewise, in a suit for breach of contract, proof of mutual promises and a breach by the defendant will make out a *primâ facie* case, yet if the defendant can show the further elements of fraud, or coverture, there is no right of recovery.[7] From this it is apparent that a change in the legal relationship between two parties, whereby one obtains a right against the other, can be defined completely only in terms of the interplay of many circumstances. What elements the plaintiff must allege and prove in an action to assert his right, and what are left to the defendant as affirmative defences, is solely a matter of fairness between the parties and of expediency in adjudicating rights.[8] The number and importance of the factors that determine the rights of the parties remains the same, whether one or the other must prove the presence or absence of those factors.[9] Clearly, if a restrospective statute enacted that contributory negligence should not bar recovery, the substantive rights would be affected, for a liability would thereby be imposed which did not before exist. But shifting the burden of proof, however important it may be to the parties in a particular case,[10] simply

[2] Throughout this discussion the phrase "burden of proof" is used in the sense of establishing a preponderance of evidence. For a treatment of the different meanings, see THAYER, PRELIMINARY TREATISE ON EVIDENCE, ch. 9.

[3] Peace *v.* Wilson, 186 N. Y. 403, 79 N. E. 329; Edelstein *v.* Carlile, 33 Colo. 54, 78 Pac. 680; Willard *v.* Harvey, 24 N. H. 344; Lawrence Ry. Co. *v.* Commissioners of Mahoning Co., 35 Oh. St. 1; De Cordova *v.* Galveston, 4 Tex. 470; Hubbard *v.* New York, N. H. & H. R. Co., 70 Conn. 563, 40 Atl. 533; Chicago & Western Indiana Ry. Co. *v.* Guthrie, 192 Ill. 579, 61 N. E. 658; Lane *v.* White, 140 Pa. St. 99, 21 Atl. 437. 2 LEWIS' SUTHERLAND, STATUTORY INTERPRETATION, 2 ed., §§ 674, 1225.

[4] For a more complete statement of these cases, see RECENT CASES, p. 98.

[5] Wallace *v.* Western N. C. R. Co., 104 N. C. 442, 10 S. E. 552; Southern Indiana Ry. Co. *v.* Peyton, 157 Ind. 690, 61 N. E. 722. 2 WHARTON, CONFLICT OF LAWS, 3 ed., 1107.

[6] In jurisdictions where contributory negligence is an affirmative defence.

[7] See LANGDELL, EQUITY PLEADING, § 109, pp. 123–126.

[8] *Ibid.*, p. 124.

[9] "The statute before us does not in any manner excuse or relieve the plaintiff from the consequences of contributory negligence long recognized by law, nor make the presence of concurrent fault less effective to the defendant in escaping liability." Southern Indiana Ry. Co. *v.* Peyton, 157 Ind. 690, 693, 61 N. E. 722, 723.

[10] "The rule springing from such legislation seems to be that litigants must prose-

reapportions the evidential tasks involved in presenting the whole case. The substance of the controversy is unchanged. No doubt one source of confusion in this subject is the tendency to mistake for matters of substantive right certain methods of procedure which are guaranteed by the Constitution against the operation of retrospective legislation. Thus, for instance, retrospective legislation abolishing trial by jury [11] in criminal cases is held void under the *ex post facto* clause, because the change, it was said, "took from the accused a right that was regarded, at the time of the adoption of the Constitution, as vital for the protection of life and liberty, and which he enjoyed at the time of the commission of the crime charged against him." [12] Likewise, a similar statute diminishing the amount of proof necessary to convict can have no retroactive effect.[13] It might erroneously be inferred from this that other rules of procedure — including those regarding the incidence of the burden of proof — are of the substance of a party's case. These decisions, however, do not rest on any distinction between substantive and procedural law, but depend merely on whether a change in procedure has undermined constitutional rights.

RECENT CASES

BANKRUPTCY — DISCHARGE — DEBTS NOT AFFECTED — DEBTS OMITTED FROM SCHEDULES — KNOWLEDGE OF PROCEEDINGS IN BANKRUPTCY. — The defendant, a bankrupt, failed to schedule a debt owed to the plaintiff. A stranger to both parties told the plaintiff that the defendant had gone into bankruptcy at a time when the former might have availed himself of the rights and privileges of other creditors. *Held*, that this knowledge is not sufficient, under § 17 *a*, of the Bankruptcy Act, to bar his claim. *Wheeler* v. *Newton*, 154 N. Y. Supp. 431 (Sup. Ct. App. Div.).

Under the Bankruptcy Act of 1867, the claim of a creditor was barred by the discharge of the bankrupt irrespective of the scheduling of his claim or of his receipt of notice or knowledge of the proceedings. *Platt* v. *Parker*, 13 N. B. R. 14; *Lamb* v. *Brown*, Fed. Cas., No. 8011. In the Act of 1898, the harshness of this rule was relieved by the exception of unscheduled debts from the operation of the discharge. 30 U. S. STAT. 550, § 17 *a* (3); COLLIER,

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cute or defend in the manner prescribed at the time the suit is entered, without reference to when the cause of action accrued, or the character of previously existing forms of procedure, though it may turn out that present modes are less advantageous to one of the parties." Southern Indiana Ry. Co. *v.* Peyton, 157 Ind. 690, 693, 61 N. E. 722, 723.

[11] It is clear that the intrinsic elements of a legal controversy remain the same whether tried before a jury or before a judge, just as they remain unchanged whether the plaintiff or the defendant has the burden of proving a particular element.

[12] State *ex rel.* Sherburne *v.* Baker, 50 La. Ann. 1247, 24 So. 240.

"The difficulty is not so much as to the soundness of the general rule that an accused has no vested right in particular modes of procedure, as in determining whether particular statutes by their operation take from an accused any right that was regarded, at the time of the adoption of the Constitution, as vital for the protection of life and liberty, and which he enjoyed at the time of the commission of the crime charged against him." Thompson *v.* Utah, 170 U. S. 343, 352. COOLEY, TREATISE ON CONSTITUTIONAL LIMITATIONS, 6 ed., 326.

[13] See Duncan *v.* Missouri, 152 U. S. 377, 382.